UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Scott P. Roeder, Individually and as Next Friend of Unborn and Partially Born Individuals under Sentence of Death, Petitioner, vs. Dan Schnurr, Warden, Hutchinson Correctional Facility, Respondent.	)	Civil Action No. 5:20-cv-03275-SAC **** CAPITAL CASE **** Executions Scheduled: Daily

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

Petitioner, Scott P. Roeder, respectfully submits to this Court his reply to respondent's answer (Doc. 27).

Comments on Facts of the Case

The factual findings of the Kansas Supreme Court (KSC) on direct appeal offered by the respondent as the "facts of the case" (Doc. 27, pp. 6-9) are conspicuously mired in prejudicial commentary: "From the record, one cannot discern whether Roeder grasped the irony of his testimony, *i.e.*, the only way that Roeder could kill the doctor in the name of his own God was to commit the murder in the house of Dr. Tiller's God." See Doc. 27, p. 7, lines 29-32.

On the contrary, it is the KSC that failed to grasp the irony of Dr. Tiller's demise. Dr. Tiller performed late-term executions. If the womb is likened to the inside of a church, then the birth canal may be likened to its foyer or narthex. In one manner of late-term execution, a child is delivered from the sanctuary of the womb and is lethally executed by manner of a wound made

to the head in the birth canal. Hence, it is with great irony that Dr. Tiller received his poetic comeuppance by manner of a wound to the head made in a church foyer.

Petitioner submits that the overt willingness of the KSC to digress into prejudicial commentary casts reasonable doubt that its decision was based on law and facts alone. Instead, the KSC could not restrain its politically motivated indifference for petitioner's rights, not even when purporting to summarize the facts of the case. Such clear and convincing evidence of bias coming even from the ranks of the KSC should temper the Court's willingness to give "'deference to [the] state court decisions' on the merits." *Frost v. Pryor*, 749 F.3d 1212, 1222 (10th Cir. 2014) (citing *Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013)).

Comments on Availability of the Record

Respondent states (Doc. 27, p. 9, lines 14-17): "Respondent has submitted to this Court … his K.S.A. 60-1057 cases, Case Nos. 17-CV-19 and 17-CV-2373." But it is not clear what respondent means by Case No. 17-CV-19. Besides Case No. 17-CV-2373, there was another case in the District Court of Sedgwick County, Kansas, styled by the petitioner as a K.S.A. 60-1507 case, Case No. 10-CV-882; however, respondent makes no mention of that case.

Comments on Standard of Review

Petitioner believes the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is unconstitutional and that the Supreme Court should do away with it in favor of constitutional habeas corpus practices. AEDPA requires this Court to do two things it should not: by allowing the judicially-created doctrine of comity to suspend the federal privilege of habeas corpus, as if to circumvent the Suspension Clause under the guise of leaving a few small cracks in the floor; and, by requiring the federal judiciary to turn a blind eye to inequitable state conduct, also in the name of comity. Comity is not meant for either of those things. Unfortunately, though originally

well-intentioned, the doctrine of comity has degraded into little more than a shameful conspiracy between state governments and the federal judiciary thanks to AEDPA.

The bar raised by AEDPA is quite fanciful indeed. It assumes pro se petitioners are legal geniuses with unlimited resources to divine the multifaceted ramblings of the American judiciary. Yet, humorously, with the shoe on the other foot, the states themselves are exempt from all of that.

As respondent acknowledges (Doc. 27, p. 10, lines 17-20):

> A state court need not cite Supreme Court precedent to avoid running afoul of AEDPA–"indeed, it does not even require *awareness* of [Supreme Court cases], so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

But with the shoe on the petitioner's foot, the utmost pedantic awareness of Supreme Court cases is required to avoid running afoul of AEDPA. Specifically, AEDPA will not allow a federal court to grant habeas corpus relief under 28 U.S.C. § 2254(d)(1) unless the petitioner shows that the state's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

AEDPA's role reversal is a contradiction of legal common sense. Under AEDPA, the pro se petitioner must have comprehensive awareness of Supreme Court cases, but the state need not have any awareness at all. Legal common sense dictates the opposite.

In practice, AEDPA is a comedy of deference: if the state suggests a procedural default, refusing to rule on the merits of a claim, then the federal courts accept the suggestion and bar the claim from further consideration; if the state suggests counsel was not ineffective, the federal courts accept that suggestion too; and so on.

The problems with the culture of deference created by AEDPA run even deeper than its rote application. All too often the Supreme Court's frequent obscurity and piecemeal interpretation of federal law confuses the lower courts. As a consequence, AEDPA's notion of clearly established Federal law, as determined by the Supreme Court, can be inherently elusive. Hence, one of the deeper problems with AEDPA is that it endeavors to base matters on "clearly established" federal law as determined by a court which is all too often unclear.

Put another way, AEDPA allows the obscurity of the Supreme Court to work to the wrongful advantage of the state.

Unfortunately, the Supreme Court's frequent obscurity impacts AEDPA in other ways as well. For example, many of the myriad Supreme Court cases instructing the federal courts to apply a procedural default under AEDPA can be misunderstood as applying where they do not. When this happens, the comedy which is known as AEDPA takes its all too predictable course: the district court dismisses the petitioner's claims as procedurally barred without any adjudication on the merits, a certificate of appealability is denied and no counsel is appointed for appeal, the court of appeals denies a certificate of appealability, and the Supreme Court denies certiorari.

In other words, what is happening is that AEDPA's mantra of deference has led the lower courts to presume the Supreme Court has instructed deference even in cases where it has not clearly done so. Of course, upon petition for a writ of certiorari, in theory the Supreme Court could clarify itself, but it seldom takes the opportunity to do so. As Supreme Court Rule 10 explains, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

All of this works to the wrongful advantage of the state.

As a case in point, in refusing to excuse on the basis of collateral-review ineffective assistance a procedural default asserted sua sponte against petitioner's legal indifference claim, the Court states on denial of reconsideration (Doc. 21, p. 2, line 21—p. 3, line 2):

> In addition, when relying on ineffective assistance of counsel to excuse procedural default of a claim, "the assistance must have been so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). As an independent constitutional claim, that ineffective assistance of counsel "generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'" 529 U.S. at 452. Because petitioner has not presented to the state courts his claim that collateral-review counsel provided ineffective assistance, he may not use it here as cause for default.

The decision in *Edwards* is exemplary of Supreme Court obscurity in matters of habeas corpus. As Justice Breyer states in his concurrence, 529 U.S. at 454:

> I believe the Court of Appeals correctly decided the basic question: "Whether a federal habeas court is barred from considering an ineffective-assistance-of counsel claim as 'cause' for the procedural default of another claim when the ineffective-assistance claim is itself procedurally defaulted." The question's phrasing itself reveals my basic concern. Although the question, like the majority's opinion, is written with clarity, few lawyers, let alone unrepresented state prisoners, will readily understand it. The reason lies in the complexity of this Court's habeas corpus jurisprudence -- a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. Today's decision unnecessarily adds to that complexity and cannot be reconciled with our consistent recognition that the determination of "cause" is a matter for the federal habeas judge.

Though Justice Breyer fell short of saying few federal judges will readily understand the decision in *Edwards*, it is hard to imagine why this group would be exempt, given the premise that few lawyers will readily understand it. Yet inasmuch as the unrepresented state prisoner is unlikely to readily understand it, it is difficult for the present petitioner to determine whether the Court has applied *Edwards* correctly in this case. Unfortunately, AEDPA requires nothing more than the Court's word for it, regardless the merit of the claim against which a procedural default is being enforced.

But rather than digressing on it here, the question of whether the Court properly applied *Edwards* is saved for another section. Yet it is useful to keep in mind at this point that AEDPA allows the federal courts to enforce a procedural default even when it stems from the ineffective assistance of collateral-review counsel.

In 1948, when Section 2254 and its federal counterpart, Section 2255, were first created, the American legal system observed for the most part a system of trials. June 25, 1948, ch. 646, 62 Stat. 967. But as the Nation descended into a system of pleas, there was increasing pressure to procedurally suppress habeas corpus to keep a lid on the widespread travesty associated with plea bargaining, among other faults of the legal system. The problem Congress faced was a social one: How to degrade habeas corpus without tarnishing the reputation of the legal system. But the public was so aggrieved by the 1995 Oklahoma City bombing that it gave rise to strong sentiment in favor of quickly executing those responsible, rather than having to face protracted proceedings. So Congress was able to slip in its 1996 revision of habeas corpus under the radar without provoking adverse sentiments. This explains, then, in a historical context, why the 1996 revision has such a bizarre title: Antiterrorism and Effective Death Penalty Act. Pub. L. 104–132, title I, §104, Apr. 24, 1996, 110 Stat. 1218.

The transition to the system of pleas is a consequence of the unfortunate ways in which resentful states slowly adapted to the federal right to counsel in state criminal proceedings, an adaptation that quickly caught on in federal criminal proceedings as well. In 1963, a unanimous Supreme Court extended a federal right to counsel to state felony prosecutions, holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). At first blush, many states resented the duty to appoint counsel

provided by *Gideon*, because they feared appointed counsel would slow the legal turnstile. For similar reasons, many states resisted the concept of giving arrestees the Miranda admonition to advise them of their rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). But states soon warmed up to the duty to appoint counsel, once they realized that, on the contrary, appointed counsel can actually speed up the legal turnstile, by advising plea agreements instead of trials.

Thus began the descent into the system of pleas.

Two dichotomies are evident from this transition. On the one hand, states have put aside their initial resentment of *Gideon* and now all but insist that criminal defendants accept the assistance of counsel. On the other hand, Miranda rights never fully caught on (outside of television) and in more recent times have all but been scrubbed. *Berghuis v. Thompkins*, 560 U.S. 370 (2010). Similarly, on the one hand states tout the importance of pre-conviction counsel. On the other hand, there is as yet no recognition of a federal guarantee of the right to counsel in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). These unfortunate dichotomies are explained by support for what greases versus what slows the legal turnstile.

And thanks to AEDPA, states like Kansas have been able to introduce a new adaptation. As seen in petitioner's collateral-review appeal, Kansas maintains a roll of attorneys who can be counted on not to fully brief their appeals. The Kansas Court of Appeals (KCOA) then declares a procedural default and the federal courts enforce it.

This post-AEDPA adaptation reveals a third dichotomy. With one face the state extols the presumption that counsel was wholly effective through direct appeal. With another face the state does not hesitate to attack the competence of counsel on collateral review. This unfortunate dichotomy is easily explained: where there is a federal right to effective assistance, the state pretends all was in order to avoid a ground for habeas corpus relief; but where no such right has

been recognized, the state gratuitously attacks counsel's competence in an effort to provoke a procedural default.

Thanks to AEDPA, this strategy works to the state's wrongful advantage.

In closing this section, a few notes are in order to evidence the veracity of the foregoing analysis of AEDPA as it relates to petitioner's case.

Respondent's answer (Doc. 27, #2, pp. 18-22) is exemplary of the state's effort to show all was in order concerning counsels' performances through direct appeal, as if to spare no flowers in extolling the presumption of competence. But when the topic changes to collateral-review counsel's performance, Dr. Jekyll greedily drinks the AEDPA potion and turns into Mr. Hyde. This is seen when the state evaluates the performance of appointed appellate counsel on collateral review (see *Roeder v. State*, No. 119,503 (Kan. Ct. App.), Brief of Appellee, p. 4, line 11—p. 5, line 6):

> In her brief: movant' s appellate counsel summarizes the ineffective assistance of counsel claims raised in movant's 1507 motion. (Appellant's Brief, 8-10.) However, counsel engages in no independent analysis of these claims, does not explain how the district court erred, and does not even cite the applicable ineffective assistance of counsel tests.
>
> It is well settled that simply pressing a point without pertinent authority, or without showing why it is sound despite a lack of supporting authority, is akin to failing to brief an issue; where appellant fails to brief an issue, that issue is waived or abandoned. See State v. Murray, 302 Kan. 478, 486, 353 P.3d 1158 (2015); State v. Gleason, 277 Kan. 624, 655, 88 P.3d 218 (2004). See also Rule 6.02(a)(5) (2013 Kan. Ct. R. Annot. 39) (appellant's brief must include "the arguments and authorities relied on"). Similarly, a point raised incidentally in a brief and not argued therein is also deemed abandoned. State v. Spraque, 303 Kan. 418, 425, 362 P.3d 828 (2015).
>
> Given counsel's failure to provide any support for the claim that the district court erred, this court should not reach the merits of the underlying ineffective assistance of counsel claims. See Pack v. State, No. 118,581, 2019 WL 325140 (Kan. App. 2019) (unpublished opinion). [Footnoted omitted.]

But Mr. Hyde was not too careful here. Like the present case, the case of *Pack v. State* cited in the Brief of Appellee was also an appeal on collateral review, in which the appellant

Ronald K. Pack was represented by appointed counsel Kristen B. Patty. Yet it just so happens that Patty is the same collateral-review attorney appointed to represent petitioner in the present appeal. In other words, of all the cases the state could have cited, it happened to pick one with the same attorney.

In *Pack*, the KCOA evaluates the performance of appointed collateral-review counsel as follows (*id.* at p. 3, lines 3-10):

> On appeal, Pack raises 20 claims of ineffective assistance of trial counsel. However, except for references to the standard of review and the *Strickland* ineffective assistance of counsel test, Pack cites no authority suggesting the district court erred in denying his 60-1507 motion. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Pewenofkit*, 307 Kan. 730, 731, 415 P.3d 398 (2018). Because Pack cites no authority and does not explain how the district court erred, we find he has abandoned these issues.

Hence, it would have been known from *Pack* that appointed counsel Patty would unlikely be competent to brief petitioner's appeal either. From this it is evident that the effectiveness of counsel appointed in Kansas on collateral review can be dependably incompetent, such that the appointment of counsel works to the wrongful advantage of the state. This explains why Pack's attorney was kept on the state's rolls to represent the likes of the present petitioner: It works to the wrongful advantage of the state.

Thanks to AEDPA, the state does not have to worry about being contradicted by the federal judiciary in such matters, because the federal courts dependably play along by enforcing a procedural default. This way no one has to touch the merits.

Comments on Respondent's Arguments

The arguments address petitioner's claims of denial of A) the twin rights, B) effective assistance, C) jury selection open to the public, and D) a stay of lethal execution.

It is important to introduce the legal arguments with a human perspective.

1.

Appendix A shows a photo of a bright young man whose parent wrote a letter to petitioner in prison to thank him for saving this beautiful boy from being executed by Dr. Tiller.

In other words, along with many other children, this fine young man in particular was scheduled to be executed by Dr. Tiller. But petitioner saved him. Petitioner saved him by shooting and killing his would-be executioner in advance.

In accordance with the Court's policy on minors, identifying information has been redacted by placing a bar over the eyes of the handsome young man in this photo, and his real name has been changed to protect his identity.

Petitioner will call him "Sam."

The photo was taken when Sam was five. Now Sam is 12.

There are other children like Sam who petitioner saved by shooting their would-be executioner in the head and killing him.

Petitioner did what was necessary to fight for Sam's freedom. Without petitioner, Sam would be dead.

What petitioner did may look ugly, but it would be uglier for Sam to be dead.

Many brave Americans have stood up to fight for our freedom. The Court is asked to acknowledge that petitioner is one of them.

It would be disrespectful to all who have fought for our freedom to give petitioner anything less than fair proceedings.

With this human perspective in mind, the Court is asked to take particular note that the KSC rejected petitioner's claim that the legal harm or evil he sought to prevent by killing Dr. Tiller was "imminent."

Using the argument "one does not wait over a decade to prevent an imminent harm," it was in this manner that the KSC rejected petitioner's claim that the legal harm or evil he sought to prevent was imminent. See *State v. Roeder*, No. 104,520 (Kan. S. Ct. 2014), Opinion of the Court, at p. 22, lines 18-19.

Here fairminded jurists can unanimously agree that the KSC is clearly befuddled in its sense of reality for an obvious reason: Sam was not conceived a *decade* before petitioner killed his would-be executioner.

Sam's execution was imminent because it was scheduled.

Though petitioner did not save the children Dr. Tiller executed a decade or even a week before, he did save Sam.

It makes no difference if Sam's execution was scheduled for the next day, the next week, or the next month: Sam was on death row.

His execution was scheduled.

Dr. Tiller was scheduled to execute Sam.

As with anyone scheduled for lethal execution, Sam's execution was imminent.

That is why we say people are on "death row": they are scheduled for imminent lethal execution.

Petitioner saved Sam and children like him from their scheduled executions.

He saved them by shooting and killing their would-be executioner.

In so doing, petitioner saved American lives from the hands of terror.

2.

Humanity has a sordid history of hiding behind euphemisms to excuse even the most grotesque murderous conduct.

Take, for example, scalping. Instead of saying "murder" or "lethal execution," a euphemism is used: scalping.

In our Nation's early history, people generally did not admit they were paid to murder Native Americans. Instead, they would say they received a bounty for each of the Native Americans they had scalped.

Unfortunately, this sordid history of hiding behind euphemisms remains with us to this day in the form of abortion.

In America today, abortion is the euphemism of choice for executing a baby.

Nor are our Nation's practices of scalping and abortion as distant from each other today as one might wish to imagine.

For example, as LifeNews.com recently reported, "A new video from the Center for Medical Progress exposes a gris[]ly experiment at the University of Pittsburgh that involved scalping five-month aborted babies and implanting their scalps onto rodents." See "Scientists Use Scalps From Aborted Babies to Create 'Humanized Mice' and Fauci is Funding It," by Micaiah Bilger, LifeNews.com, May 4, 2021.

But rather than squarely facing the legal harm of evil of "homicide" which the euphemisms of scalping and abortion entail, the primitive imagination defers to a moral or ethical belief that there is simply nothing wrong with scalping or abortion.

Nonetheless, fairminded jurists can unanimously agree that testimony from the coroner will inevitably result in a determination of homicide in such cases.

As grotesque forms of murder, in reality there is nothing moral or ethical about scalping or abortion. But to the primitive imagination it may seem moral or ethical, whether to abate unwanted inhabitants or to abate unwanted pregnancies.

Gradually, the euphemisms become so engrained in society that they seem as if a separate subject compared to homicide.

For example, consider the 1972 statement on abortion from the Church of Jesus Christ of Latter-Day Saints: "As the matter stands today, no definite statement has been made by the Lord one way or another regarding the crime of abortion. So far as is known, he has not listed it alongside the crime of the unpardonable sin and shedding of innocent human blood." See *Priesthood Bulletin*, June 1972.

Now consider the same statement by substituting a relatively more antiquated euphemism—scalping—in place of abortion: "As the matter stands today, no definite statement has been made by the Lord one way or another regarding the crime of [scalping]. So far as is known, he has not listed it alongside the crime of the unpardonable sin and shedding of innocent human blood."

In other words, such euphemisms become so engrained in society that people begin to wonder why their ancient authorities did not address the subject with specificity using the same euphemism at issue. As a consequence, people may develop a faulty moral or ethical belief that the conduct circumscribed by the euphemism is acceptable in at least some circumstances, as an act distinct from murder.

Yet despite the contrary views of the primitive imagination, saving a child from abortion is just as noble as saving one from scalping.

And this is precisely what petitioner did: He saved Sam before he got scalped by Dr. Tiller.

A. Denial of the Twin Rights

The Court should require respondent to specifically answer the fact that the magistrate's denial of bond was contrary to statute and the state constitution. See *State v. Roeder*, No. 09-CR-1462 (Sedg. Co. Dist. Ct.), Journal Entry – Felony Case First Appearance, and in particular the handwritten entry reading --No bond-.

Importantly, the first appearance doubled as an unconstitutional proceeding to deny bond in absence of counsel.

In his answer, respondent's legal arguments made about standard first appearances are specious because petitioner's first appearance was clearly not standard, given that his statutory and state constitutional right to bond was denied. See Doc. 27, #1, pp. 12-17.

On the contrary, it was the proceeding to deny bond that was seamlessly appended to the first appearance which presented a critical proceeding.

The proceeding to deny bond was a critical proceeding because petitioner had a statutory and state constitutional right to bond.

The Kansas Constitution Bill of Rights, § 9, guarantees a state constitutional right to bail ("All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.")

In Kansas, a proceeding to deny bond is not germane to the first appearance in a criminal case. This is evident because the legislature expressly requires the magistrate to set a bond amount at the first appearance. See K.S.A. 22-2802(1) ("Any person charged with a crime shall, at the person's first appearance before a magistrate, be ordered released pending preliminary examination upon the execution of an appearance bond in an amount specified by the magistrate....") Accordingly, the legislature interprets the state constitutional right to bail as commencing at the defendant's first appearance before the magistrate.

The Supreme Court has held that the "critical stages" of a criminal proceeding include "where certain rights may be sacrificed or lost, *Hamilton v. Alabama*, 368 U. S. 52, 368 U. S. 54 (1961), see *White v. Maryland*, 373 U. S. 59 (1963), and the pretrial lineup, *United States v. Wade*, *supra*; *Gilbert v. California*, *supra*." *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

Because a state constitutional right hangs in the balance and may be sacrificed or lost, fairminded jurists will unanimously agree that a proceeding to deny bond in Kansas is a critical proceeding.

In *Rothgery v. Gillespie County*, 554 U.S. 191, 191 (2008), the Supreme Court ruled that the Sixth Amendment right to counsel attaches in criminal cases to all adversary judicial proceedings ("A criminal defendant's initial appearance before a magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.")

Because there is a statutory and state constitutional right to bail, fairminded jurists will unanimously agree that a proceeding to deny bond in Kansas is an adversary judicial proceeding.

The magistrate seamlessly sped without interruption from the initial appearance proceedings, in which petitioner learned of the charges against him, to the adversary judicial proceedings, in which petitioner was denied bond. However, this blurring of proceedings does not alter *Rothgery's* clear instruction that the Sixth Amendment right to counsel attaches in criminal cases to all adversary judicial proceedings.

Fairminded jurists will unanimously agree that *Rothbery's* instruction would be meaningless if magistrates were allowed to append any multitude of adversary judicial proceedings to the initial appearance so as to avoid triggering the attachment of the Sixth Amendment right to counsel.

Accordingly, fairminded jurists will unanimously agree in view of *Rothbery* that the Sixth Amendment right to counsel attached to the proceeding to deny bond.

Having established that petitioner was denied the Sixth Amendment right to counsel at the proceeding to deny bond, attention now turns to the question of whether petitioner was present at that proceeding.

The Supreme Court has identified notice and an opportunity to be heard as the hallmarks of procedural due process, which is protected by the Due Process clause of the Fifth Amendment to the United States Constitution. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). And as the KSC explains: "To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense. *United States v. Mosquera*, 816 F.Supp. 168, 172 (E.D.N.Y. 1993)." *State v. Calderon*, 270 Kan. 241, 245 (2000).

Because petitioner was not informed that the proceeding to deny bond would be seamlessly appended to his initial appearance, fairminded jurists will unanimously agree that he was not constitutionally present at the proceeding to deny bond.

"In America, the foundation of our liberty is due process of law. Underpinning that foundation, for those accused of crimes, are the twin rights of being present at all critical stages of a criminal prosecution and being free to retain counsel of choice." *State v. Carver*, 32 Kan. App. 2d 1070, 1071 (Kan. Ct. App. 2004).

Accordingly, fairminded jurists will unanimously agree that petitioner was denied at the proceeding to deny bond the "twin rights" of being constitutionally present and having counsel for his defense.

The Court is alerted to inequitable conduct on the part of the KCOA in offering its analysis of petitioner's twin rights claim. Specifically, the KCOA states: "Even if we construed his first court appearance to be a critical stage of the criminal proceedings against him, Roeder does not allege, nor is there record evidence to establish, that Roeder was prejudiced in any way." *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 9, lines 20-22. Additionally, the KCOA states: "Significantly, Roeder does not argue, nor are there facts in the record to establish, that Roeder's appearance at the first court hearing by video, as opposed to an in-person appearance, deprived him of any constitutional right…." Id., at p. 8, lines 12-16.

The Court is similarly alerted to inequitable conduct on the part of respondent for repeating in his answer the plainly false statements made by the KCOA. See Doc. 27, p. 14, lines 3-4 ("[H]e does not allege he was actually prejudiced in any way.") See also id., at p. 13, lines 2-7. See also id., at p. 16, lines 3-5.

On the contrary, the record plainly establishes petitioner's allegation of prejudice and the deprivation of constitutional rights (see *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Movant's Brief in Support of Motion Attacking Sentence, p. 10, lines 7-13):

> Roeder contends that the combination of being denied bond while appearing by two-way communication on national television in jail clothes made him look like a terrorist who was too dangerous to be let into the actual courtroom let alone out on bail. Since this egregious harm to his constitutional rights and the public's perception of him will not simply be erased by a new trial, his convictions must be reversed and the charges against him must be dismissed with prejudice on all counts.

In a nutshell, the prejudice effectuated by the proceeding to deny bond had a snowball effect, which set the stage for a lengthy and gratuitous pattern of legal indifference for petitioner's rights.

For example, two days later, the trial court set excessive bail ($5 million) on grounds of its prejudicially expressed concern that petitioner "wouldn't perpetuate, participate or enact any

more violence on his own or in concert with others." Emphasis added. *State v. Roeder*, No. 09-CR-1462 (Sedg. Co. Dist. Ct.), Transcript of Hearing on Motion for Appearance Bond.

Indeed, that the proceeding to deny bond set the stage for an ongoing pattern of legal indifference for petitioner's rights is fully evident in that the KCOA even resorted to inequitable conduct on collateral review in an effort to defeat petitioner's twin rights claim.

Let the Court reflect that the contumacy of the magistrate which was shown by way of the proceeding to deny bond is exemplary of deep-seated indifference for petitioner's legal rights and that the political motivations are obvious. The combination of the petitioner being denied bond in absence of counsel while appearing by two-way communication on national television in jail clothes made him look like a terrorist who was too dangerous to be let into the actual courtroom let alone out on bail. Since this egregious harm to his constitutional rights and the public's perception of him will not simply be erased by a new trial, the logical and fatal effect on the state's case of the magistrate's contumacy is that his convictions must be reversed and the charges against him must be dismissed with prejudice on all counts.

Prejudice is shown because denial of the twin rights affected the fundamental fairness, honesty, and public reputation of petitioner's judicial proceedings. See *State v. Carver*, id. at 1086. Nonetheless, prejudice need not be shown due to absence of counsel. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.") Noted is that respondent's answer (Doc. 27, pp. 16-17 ("Harmless Error")) misappropriates the harmless error analysis applied in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which is limited to trial error under the standard of *Doyle v. Ohio*, 426 U. S. 610 (1976). See *Brecht*, id. at 623 ("[T]he standard for determining whether habeas relief must be granted is whether the *Doyle* error 'had substantial and injurious

effect or influence in determining the jury's verdict.' *Kotteakos v. United States*, 328 U. S. 750, 776 (1946).") In contrast, Kansas generally treats denial of the twin rights as a structural error not subject to harmless error analysis. See *State v. Carver*, supra. Yet either way, it is evident that the denial of the twin rights set in motion a snowball of legal indifference from the get-go which continued to roll downhill not merely to the point of the jury's verdict, but all the way to the point of direct and even collateral review. Accordingly, it is fair to say that the denial of the twin rights had a substantial and injurious effect or influence in shaping the course of the trial and, hence, in determining the jury's verdict.

For example, after the denial of the twin rights, the next stop on the snowball's path was a hearing on a motion for an appearance bond. Having been preceded by the denial of the twin rights, fairminded jurists would unanimously agree that the trial court's decision to set excessive bail ($5 million), in concert with an attack on the presumption of innocence (by voicing concern that petitioner "wouldn't perpetuate, participate or enact any *more* violence on his own or in concert with others" (emphasis added)), had a substantial and injurious effect or influence on the integrity of the legal shelter provided by the presumption of innocence; for there is little hope in relying on a presumption of innocence that has already been riddled with contempt. See *State v. Roeder*, No. 09-CR-1462 (Sedg. Co. Dist. Ct.), Transcript of Hearing on Motion for Appearance Bond. Indeed, without the legal shelter provided by the presumption of innocence, there is little alternative but to advocate an affirmative defense or lesser included offense. Accordingly, it is fair to say that the denial of the twin rights had a substantial and injurious effect or influence in shaping the course of the trial and, hence, in determining the jury's verdict.

Respondent argues that petitioner was appointed counsel as soon as practically possible. Doc. 27, p. 16, lines 9-15. This fails for two reasons. One is that the magistrate could have at

least waited until counsel was present before presuming to deny petitioner his statutory and state constitutional right to bond. The other is that K.S.A. 22-4502 provides a procedure for defendants to obtain services for representation prior to appearance before a court: "The state board for indigents' defense services shall prescribe by rule and regulation the procedure to be followed by law enforcement officials in obtaining the services of counsel from the panel for indigents' defense services to represent indigent persons detained by such law enforcement officials prior to appearance before a court." Cf. Fed. R. Crim. P. 44(a).

Noted is that counsel was ineffective who failed to raise the twin rights violation on direct appeal. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Motion Attacking Sentence, Claim Four, Supporting Facts, p. 6, lines 8-12 ("Regarding plain errors, appellate counsel was ineffective who did not raise on direct appeal issues affecting my substantial rights, including: … denial of the twin rights at the so called first appearance….")

Also noted is that counsel was ineffective who failed to preserve the twin rights violation at the trial court as an error fatal to the state's case. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Motion Attacking Sentence, Claim Three, Supporting Facts, p. 5, lines 9-12 ("Regarding my so called first appearance before the magistrate, counsel was ineffective who merely objected to the denial of bail, without making any objection to the denial of the twin rights which serve as the underpinning of due process in America.")

Because the twin rights serve as the underpinning of due process which is the foundation of our liberty in America for those accused of crimes, see *State v. Carver*, id. at 1071, fairminded jurists will unanimously agree that trial counsel was ineffective who failed to preserve the twin rights violation as an error fatal to the state's case and that appellate counsel was ineffective who failed to raise the twin rights violation as plain error on direct appeal.

Also noted is that Kansas Constitution Bill of Rights, § 10, guarantees a state constitutional right for the accused "to appear and defend in person"; that under K.S.A. 22-2802(14) the Kansas legislature interprets this right to mean personal presence (as opposed to electronically simulated or remote presence), such that even with regard to the first appearance "[t]he defendant shall be informed of the defendant's right to be personally present in the courtroom…"; and, that petitioner's statutory and state constitutional right to be personally present in the courtroom was violated because he was not informed of that right prior to appearing before the magistrate.

Also noted is that the KCOA quibbled over a transcript of proceedings provided by petitioner as being "uncertified." See *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 8, lines 24-27. The transcript was provided as a courtesy by a Sedgwick County District Court court reporter from an Associated Press videotaping of the first appearance made available on YouTube. See Associated Press, "Raw Video: Abortion Shooting Suspect Charged," https://youtu.be/C5_hZln8Gn0. Unfortunately, the district court does not provide recordings or transcripts of initial appearances and its court reporters are not permitted to make certified transcripts from YouTube. Petitioner is not a millionaire who can afford to hire an outside court reporter to certify the transcript. Any questions about the transcript should be probed in an evidentiary hearing.

Also noted is that the KCOA states, "And even if we could consider the uncertified transcript attached to his brief, that transcript affirmatively indicates that Roeder appeared at the hearing 'in person.'" *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, at p. 8, line 27—p. 9, line 2. However, as this Court will undoubtedly appreciate, what the transcript indicates is that he appeared in person, meaning in propria persona, as opposed to by

counsel—not that he was constitutionally present or even personally present in the courtroom. See *Roeder v. State*, No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, App. B-1, lines 18-20.

To sum up, the motion, files, and records of the case conclusively establish petitioner is entitled to relief on his claim that he was denied the twin rights at the proceeding to deny bond which was seamlessly appended to his initial appearance, given that he was neither represented by counsel nor constitutionally present when bond was denied by the magistrate, and there is no possibility that fairminded jurists could disagree that the state court decision conflicts with the Supreme Court's precedents and/or that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

B. Ineffective Assistance

In addition to absence of counsel at the proceeding to deny bond which was seamlessly appended to the first appearance, petitioner's 60-1507 motion enumerates a list of other examples of the ineffective assistance of trial and direct appeal counsel and he has briefed them at the state district court. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Motion Attacking Sentence, pp. 5-7 ("Claim Three" and "Claim "Four"). See also id., Movant's Brief in Support of Motion Attacking Sentence, pp. 15-30 ("Claim 3" and "Claim 4"). Because such matters have been adequately stated in the record, there is no need to repeat them here, except to say that their cumulative nature bears strongly against the fundamental fairness of proceedings.

However, as to ineffective assistance, the KCOA gave particular focus to the meaning of imminence and to the absence of a coroner's testimony on the subject of the legal harm or evil of homicide which is performed in an abortion. See *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, pp. 10-17 ("Ineffective assistance of counsel").

Accordingly, petitioner will address the same focus here.

At issue is 1) testimony from the coroner to confirm that the abortions performed by Dr. Tiller constitute the legal harm or evil of homicide, and 2) petitioner's definition of imminence, which is supported by the definition of the U.S. Department of Justice's Barron's Memo.

By the following analysis, petitioner will show that it was "necessarily unreasonable" for the KCOA to conclude, on the first prong of the Strickland test, "that he had not overcome the strong presumption of competence." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Also, given that respondent's answer concedes that the KCOA did not address the prejudice prong of the Strickland test (see Doc. 27, p. 20, lines 1-6), petitioner will further show that he was prejudiced by counsels' unprofessional errors. See *Strickland*, supra.

1.

First, why was such testimony from the coroner so critical to the defense that petitioner's right to a fair trial was so prejudiced by its absence that the outcome of his trial and direct appeal would have otherwise been different?

The reason is that the absence of such testimony from the coroner deprived petitioner of a necessity defense and instruction on a lesser included offense of imperfect defense-of-others.

As explained in *City of Wichita v. Tilson*, 253 Kan. 285, 289-90 (1993), "The harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." Under K.S.A. 22a-235, the coroner is the one to provide "competent evidence" of the legal harm or evil of homicide. Hence, without testimony from the coroner that the legal harm or evil of child homicide results from Dr. Tiller's performance of an abortion, petitioner was limited to his own moral or ethical belief that such abortions are wrong, upon which his bid to assert the necessity

defense necessarily fails under *Tilson*. In contrast, with a coroner's testimony in hand to provide competent evidence that the abortions performed by Dr. Tiller result in the legal harm or evil of child homicide, the tables are turned, because then the courts themselves are revealed as the ones who uphold abortion based on their (faulty) moral or ethical beliefs in pregnancy abatement.

At least 38 states have fetal homicide laws, including Kansas. At least 29 states, including Kansas, have fetal homicide laws that apply to the earliest stages of pregnancy (e.g., "any state of gestation/development," "conception," "fertilization," or "post-fertilization"). K.S.A. 21-5419 "Alexa's Law" defines "unborn child" as a living individual organism of the species *Homo sapiens*, in utero, at any stage of gestation from fertilization to birth. The law specifies that "person" and "human being" shall also mean an unborn child as used in K.S.A. §§ 21-5401 through 21-5406 and 21-5413, which define murder in the first and second degrees, voluntary and involuntary manslaughter, battery, aggravated battery, capital murder, and involuntary manslaughter while driving under the influence of alcohol or drugs. See State Laws on Fetal Homicide and Penalty Enhancement for Crimes Against Pregnant Women, National Conference of State Legislatures, May 1, 2018, https://perma.cc/3XTG-WDLB.

Accordingly, there can be no question in view of K.S.A. 22a-235 that the coroner is professionally capable of providing "competent evidence" of fetal homicide under K.S.A. 21-5419. Homicide is always a legal harm or evil, whether the law considers it justified or not. Consequently, if trial counsel had competently exercised the Compulsory Process Clause of the Sixth Amendment by having the coroner testify as to whether the abortions being performed by Dr. Tiller constitute the legal harm or evil of homicide, then by showing that the harm petitioner sought to prevent was a legal harm or evil as opposed to a moral or ethical belief of his own, he would have satisfied the prerequisite of *Tilson* for a necessity defense.

Prejudice is shown by counsel's underperformance because if petitioner had qualified for the necessity defense or imperfect defense-of-others, the outcome of his trial and direct appeal would likely have been different. See *Strickland*, id. at 669, 691-696.

2.

Second, why was the meaning of "imminence" so critical to the defense that petitioner's right to a fair trial was so prejudiced by its faulty definition by direct-appeal counsel that the outcome of his direct appeal would have otherwise been different?

The reason is that the petitioner must convince the jury that the harm he sought to prevent was imminent in order to prevail on the necessity defense or to limit the finding of guilt to voluntary manslaughter based upon imperfect defense-of-others.

Direct-appeal counsel's critical underperformance on this issue allowed petitioner to be slaughtered by the KSC, which states, "Stepping out of the delusional world in which Roeder apparently resides, no rational person would reasonably believe that deadly force was needed against an imminent use of unlawful force in this case." See *State v. Roeder*, No. 104,520 (Kan. S. Ct. 2014), Opinion of the Court, at p. 46, lines 10-13.

Rather than making the competent argument that a lethal execution is imminent so long as it remains scheduled, counsel made the disastrous concession on oral argument that "six months out" would not be imminent. The fatal effect of appellate counsel's ineffective concession was that it allowed the KSC to arbitrarily draw a temporal line for the meaning of "imminent" that is nearly the same as "immediate."

The fatal effect of counsel's disastrous concession is evident from the way in which the KSC ultimately couched its finding that "the necessity defense would never be available to a defendant who commits premeditated first-degree murder of a doctor in order to prevent that

doctor from performing an abortion *sometime in the future*…." Emphasis added. *State v. Roeder*, No. 104,520 (Kan. S. Ct. 2014), Syllabus by the Court, #3, at pp. 1-2. In other words, rather than saying the necessity defense would *never* be available to prevent a doctor from performing an abortion, the KSC couched its finding by saying it would not be available to prevent one from being performed "sometime in the future."

A review of oral argument on direct appeal shows that the definition of "imminence" factored in most heavily to the KSC's determination. The KSC does not provide transcripts of oral argument but posts video online. An evidentiary hearing is required to produce the transcript to examine counsel's ineffectiveness.

In the so called Barron's Memo, the U.S. Justice Department presents its own view and definition of an imminent threat. See U.S. Justice Department, Memorandum, "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi," July 16, 2010 (aka Barron's Memo) (declassified and first made public June 23, 2014). A copy of the Barron's Memo is attached as Appendix C to Movant's Brief in Support of Motion Attacking Sentence, *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.).

Because the view of an imminent threat proposed by the U.S. Department of Justice in the Barron's Memo was aligned with petitioner's own views, he asked appellate counsel in writing to raise the U.S. Justice Department's view of imminence with the KSC in the form of a supplemental brief to present the Barron's Memo as new matter intervening after oral argument but before judgment. But as is typical of ineffective assistance in America, counsel was unresponsive to petitioner. Recalling that counsel had been particularly ineffective for conceding during oral argument before the KSC that "six months out" would not be imminent, the stubborn problem of her ineffectiveness was compounded all the more by her refusal to take the

opportunity to retract her fatal concession by raising the Barron's Memo's view on imminence in a supplemental brief to the KSC.

The critical importance of the Barron's Memo is that it shows petitioner's theory of imminence is not "delusional," given that it is wholly consistent with that of the U.S. Department of Justice. The Barron's Memo forwards the view that rather than being *time-based*, the meaning of imminence is *action-based*—that is to say, it is based on the action of planning to harm American lives. Hence, rather than placing time limits on the meaning of imminence, the U.S. Department of Justice defines a threat on U.S. persons to be "imminent" when an individual (p. 41 [C-31], lines 26-28) "is engaged in continual planning and direction of attacks upon U.S. persons" even when one "does not know precisely when such attacks will occur"; and, it reaches the conclusion that an extrajudicial killing to prevent the attacks (pp. 27-28 [C-17—C-18], n. 36) "would be an act of self-defense, not an assassination." See Barron's Memo, supra.

Though the Barron's Memo addresses a lethal operation against a U.S. citizen overseas, it does not change the meaning of "imminent" as it applies to petitioner's case. Indeed, it would be highly contradictory to call a threat to U.S. persons imminent when it comes from overseas, but not when it originates here at home in Kansas.

Webster's Dictionary defines "schedule" (noun) as including the meaning of "a procedural plan that indicates the time and sequence of each operation." It also defines "schedule" (verb) as including the meaning of "to appoint, assign, or designate for a fixed time." With this definition in mind, in view of the Barron's Memo it is enough that Dr. Tiller had abortions on his schedule to say lethal executions were imminent. This makes sense whether one is talking about the scheduled execution of babies (viz. abortions) or adults. The execution is reasonably regarded as imminent as long as it remains scheduled.

Prejudice is shown by counsel's underperformance because if counsel had not conceded an arbitrary time-based definition of imminence then the outcome of petitioner's direct appeal would likely have been different. See *Strickland*, id. at 669, 691-696.

3.

Respondent's answer paraphrases the reasoning of the KCOA that because the KSC "rejected the argument that 22 hours was imminent, Petitioner could not have been prejudiced by his counsel's failure to argue that an even greater length of time in the future could be considered imminent." See Doc. 27, p. 22, lines 13-16. See also *State v. Roeder*, No. 104,520 (Kan. S. Ct. 2014), Opinion of the Court, at p. 16, lines 4-9.

However, such reasoning is faulty for an obvious reason: Whether counsel argued for a time longer or shorter than 22 hours is wholly irrelevant to the fact that, either way, counsel fatally argued a *time-based* definition of imminence (and arbitrarily limited its range to "six months out"), as opposed to an *action-based* definition as forwarded by the U.S. Department of Justice in the Barron's Memo. Importantly, under the action-based definition, time itself is irrelevant, whether 22 hours in the future or an even greater length of time in the future. Instead, under the Barron's Memo, what is relevant to the definition of an imminent threat is the "planning and direction" of the lethal attack, according to which *action* the execution remains imminent so long as it is scheduled. See Barron's Memo, id. at p. 41 [C-31], lines 26-27.

In view of the action-based definition of imminence, the KCOA's reliance on the KSC's analysis of *State v. White*, 284 Kan. 333 (2007), and *State v. Hernandez*, 253 Kan. 705 (1993), must be viewed in a different light and in keeping with the particular circumstances of petitioner's case. See *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 15, line 7—p. 16, line 13. Indeed, unlike the victims in *White* and *Hernandez*, Dr. Tiller was in

business to perform his scheduled executions like clockwork. Hence, **given the great esteem our legal system has for the U.S. Department of Justice**, the question of how the KSC would have judged the reasonableness of petitioner's actions in light of the action-based standard of imminence presented by the Barron's Memo is a question "sufficient to undermine confidence in the outcome." *Strickland*, id. at 669, 691-696.

Accordingly, fairminded jurists will unanimously agree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, ibid.

4.

Imagine switching up the euphemisms: Dr. Tiller ran an abortion/scalping clinic where he aborted/scalped unwanted individuals for a fee.

Ironically, in the early days of our Nation, the notion of an abortion clinic would have been more repulsive to the legal imagination than a scalping clinic.

The difference today is that the Nation is more preoccupied with the abatement of unwanted pregnancies than it once was with the abatement of unwanted Native American inhabitants.

By not calling the coroner to testify that performing an abortion is the legal harm or evil of homicide, the courts are allowed to hide behind the euphemism "abortion" as if to thereby shield the conduct in question from being designated as homicide.

For example, though K.S.A. 21-5419 generally acknowledges application of certain crimes to an unborn child, K.S.A. 21-5419(b)(2) specifically exempts "any medical procedure, including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian." Yet it is obvious that the coroner, based

on examination of a dead fetus alone, will generally not be able to distinguish whether the act of homicide was committed at the request of the pregnant woman, her legal guardian, or for some other reason which is not exempted by statute.

Hence, trial counsel's failure to have the coroner confirm whether the abortions performed by Dr. Tiller result in the legal harm or evil of homicide is precisely what allowed the state courts to maintain their (faulty) moral or ethical belief that murder does not include any act which is legally circumscribed by the euphemism "abortion."

Indeed, the KSC reveals as much on direct appeal (see *State v. Roeder*, No. 104,520 (Kan. S. Ct. 2014), Opinion of the Court, at p. 21, lines 11-25):

> Before considering whether Roeder chose the lesser of two evils, we must clarify the evils subject to comparison. On one side of the ledger, Roeder's admitted evil act was the premeditated intentional murder of a human being who was legally recognized as a person in all respects. Arguably, only capital murder would be a greater legal harm.
>
> On Roeder's side of the ledger, the evil he sought to prevent was Dr. Tiller's failure to comply with all of the rules and regulations applicable to abortion providers, i.e., administrative or procedural irregularities. *Roeder wants to argue that the doctor was murdering babies, but that is his religious and moral view, rather than the legal view in this state.* As noted above, *Tilson* declared that "[t]he harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." 253 Kan. at 289-90. Indeed, one need look no further than Dr. Tiller's criminal trial upon which Roeder relies to establish his belief that illegal abortions were occurring at the clinic. The doctor was not charged with murder, but rather that trial was about misdemeanor violations for failing to follow the proper procedure. [Emphasis added.]

It should be noted that the coroner examined the deceased Dr. Tiller and determined him to be a victim of homicide. Yet the coroner did not engage in a specious quibble about being unable to determine the precise moment when Dr. Tiller's life *began*. This is because homicide is not the subject of when life began, but rather how life *ended*. Hence, having ruled out natural, accidental, and self-inflicted causes of death, this leaves "homicide" as the only possible

alternative. Importantly, this sobering fact remains equally true regardless of whether the victim is born, unborn, or partially-born.

The KCOA found (see *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 12, lines 22-26):

> Given the Supreme Court's decision affirming the district court's decision to preclude Roeder from asserting a necessity defense, we find his trial counsel was not deficient for failing to call the coroner as a witness to make a factual determination "whether babies killed by performing an abortion are in fact victims of the legal harm or evil of homicide."

However, here the KCOA is applying faulty reasoning. On the contrary, petitioner's argument is that the KSC would have been forced to come to the *opposite* conclusion on direct appeal on the legal harm or evil issue, if instead counsel had called the coroner as a witness to make a factual determination of whether babies killed by performing an abortion are in fact victims of the legal harm or evil of homicide. Indeed, under K.S.A. 22a-235 the coroner's findings "shall be received in any court or administrative body in the state as competent evidence of the matters and facts therein contained." Hence, **given the great esteem the Kansas legislature has for the findings of the coroner**, the question of how the trial court and KSC would have judged the reasonableness of petitioner's actions in light of a coroner's finding on the legal harm or evil of child homicide committed when performing an abortion is "sufficient to undermine confidence in the outcome." *Strickland*, id. at 669, 691-696.

Noted is that respondent's answer makes the argumentative assertion that trial counsel made a "decision" not to have the coroner testify as to the legal harm or evil of homicide which results from performing an abortion. See Doc. 27, p. 20, line 7 ("Counsel's decision not to call the coroner as a witness.") However, any question of counsel's strategy must be probed in an evidentiary hearing. Moreover, such testimony from the coroner could not have been meritless in

view of the great esteem the Kansas legislature has for the findings of the coroner. Consequently, prejudice is shown by counsel's ineptitude in failing to call the coroner for testimony on the critical issue of the legal harm or evil of child homicide committed in an abortion.

Accordingly, fairminded jurists will unanimously agree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, ibid.

5.

Petitioner sought to avail himself of a necessity defense to establish his legal and factual innocence.

As the KCOA states the position of the KSC on this issue (see *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 11, lines 20-25):

> Given the manner in which Roeder wanted to avail himself of the necessity defense, the Supreme Court held the defense would be available only if Roeder could establish the following elements: (1) He faced a choice of evils and chose the lesser evil, (2) he acted to prevent imminent harm, (3) he reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and (4) he had no legal alternatives to violating the law. 300 Kan. at 917.

The first element is established based on the presumption of testimony from the coroner confirming that the abortions performed by Dr. Tiller result in the legal harm or evil of homicide. The second element is established based on the definition of an imminent threat offered by the U.S. Department of Justice in the Barron's Memo. The third element is confirmed by the photo of "Sam" in Appendix A. Finally, the fourth element is confirmed by the stubborn unwillingness of the Kansas and federal courts to stay the lethal executions of innocent children like Sam.

Accordingly, fairminded jurists will unanimously agree that petitioner's right to a necessity defense was prejudiced by deficient performances by trial counsel and direct-review appellate counsel.

6.

To sum up, the motion, files, and records of the case conclusively establish petitioner is entitled to relief on his claim that he was denied the effective assistance of trial and direct-review counsel, and there is no possibility that fairminded jurists could disagree that the state court decision conflicts with the Supreme Court's precedents and/or that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Comments on Procedural Default

Before commenting on respondent's remaining arguments, both of which invoke a procedural default, it is necessary to comment on the subject of procedural default itself.

Petitioner acknowledges the Court's clarification (Doc. 28) and that petitioner is not entitled to press further. However, the Court, as always, has the opportunity to review its own opinions sua sponte. Moreover, the underlying issue of procedural default must be revisited in any case, given that respondent's answer (Doc. 27, #3-4, pp. 23-27) asks the Court to enforce a procedural default.

Petitioner notes that his request for clarification (Doc. 26) was filed and entered on the same day as the Court's clarification (Doc. 28). Yet perhaps with further reflection the Court may happen to revise its opinion.

A. The Court Misapprehends AEDPA's Comity Logic

The Kansas legislature instructs that summary dismissal of a 60-1507 motion is not to be ordered "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief…." K.S.A. 60-1507(b). See also Kansas Supreme Court Rule 183(f) (2021 Kan. Ct. R. Annot. 240). Calling it "careful review," in *Louis v. State*, 2013 WL

5870165 (Kan. Ct. App. 2013) the KCOA states (at *3), "In an abundance of deference to Louis, we look at the particular issues he asserted in the 60-1507 motion in the district court, although they are not individually argued in detail on appeal."

With this in mind, the Court's clarification states (Doc. 28, p. 3, lines 3-13):

> To clarify, the Court disagrees with Petitioner's belief that the KCOA, by exercising de novo review under K.S.A. 60-1507(b), was required to consider and address every issue Petitioner raised in his 60-1507 motion to the state district court, irrespective of whether Petitioner raised them on appeal. The KCOA may have done so in *Louis*, but it did so "[i]n an abundance of deference," not because it was required to do so. See 2013 WL 5870165, at *3. When an appellant makes arguments to a district court in the context of a 60-1507 motion but then limits his arguments in his appellate brief to the KCOA, the KCOA need not address all arguments made to the district court.

In other words, the Court agrees that K.S.A. 60-1507(b) gives the KCOA *discretion* on de novo review to consider and address every issue petitioner raised in his 60-1507 motion to the state district court, irrespective of whether petitioner raised them on appeal; but, on the other hand, the Court disagrees that K.S.A. 60-1507(b) *requires* the KCOA to do so. However, assuming for the sake of argument that the Court's position is correct, the Court's concession that KCOA had *discretion* rules out a procedural default under the comity logic of AEDPA.

The Supreme Court explains the comity logic of AEDPA in the holding of *Edwards v. Carpenter*, 529 U.S. at 447:

> The comity and federalism principles underlying the doctrine of exhaustion of state remedies require an ineffective-assistance claim to be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. *Carrier*, *supra*, at 489. The doctrine's purposes would be frustrated if federal review were available to a prisoner who had *presented* his claim in state court, but in such a manner that the state court COULD NOT, under its procedural rules, have entertained it. (Second emphasis added.)

In other words, under the comity logic of AEDPA, a procedural default may be enforced only where the state court *could not*, under its procedural rules, have entertained the claim in question. In contrast, a procedural default is not available where the state court did have

discretion to entertain the claim, but simply chose not to. Hence, because the Court agrees in view of *Louis* that K.S.A. 60-1507(b) does give the KCOA discretion on de novo review to consider and address every issue petitioner raised in his 60-1507 motion to the state district court irrespective of whether petitioner raised them on appeal, a procedural default of those issues is not available under the comity logic of AEDPA.

B. No Holding Expressly Finds K.S.A. 60-1507(b) Inapplicable to De Novo Review

Under the topic of the opinion of the appellate court, Kansas Supreme Court Rule 7.04(a) (2021 Kan. Ct. R. Annot. 46) states that "[d]isposition by memorandum, without a published formal opinion … means the case does not involve a new point of law or is otherwise considered as having no value as precedent." The Court fails to provide a precedential case which expressly holds that K.S.A. 60-1507(b) does not bind the appellate courts on de novo review. The elusiveness of such a holding is of no surprise, given that the KCOA cannot determine "conclusively" on de novo review that "the motion and the files and records of the case show that the prisoner is entitled to no relief" if in fact the KCOA has limited its consideration to something less than the motion and the files and records of the case. See K.S.A. 60-1507(b). See also Kansas Supreme Court Rule 183(f) (2021 Kan. Ct. R. Annot. 240).

Aside from an actual holding, appellate court opinions must be understood in the context of the dictum they offer.

For example, the KCOA found in *Louis*, id. at *7, that despite *careful review* in keeping with K.S.A. 60-1507(b), including an *abundance of deference* to what Louis presented in his 60-1507 motion in the district court and on appeal, "Louis advances a cryptic argument" as to a constitutional speedy trial violation, and since the KCOA was unable to "divine a cogent argument for a constitutional speedy trial violation in what Louis has presented" that claim was

deemed abandoned. In so doing, the KCOA cited, purely for comparison, a case not dealing with K.S.A. 60-1507(b), namely, *Herrell v. National Beef Packing Co.*, 292 Kan. 730, 736, 259 P.3d 663 (2011) (an issue inadequately briefed on appeal deemed abandoned).

The long chain of citations ending with *Herrell* find their starting point at *State v. Words*, 226 Kan. 59, 63 (1979), which simply found on direct appeal: "There was no request for instructions on lesser included offenses in the two kidnapping counts (1 and 2), *and* the issue is not briefed on appeal. The point is deemed abandoned." Emphasis added. The emphasis is added on the conjunctive relation because the KSC found that the issue in question was supported neither by the trial record nor on appeal. This parallels to some extent what the Court in *Louis* found regarding the issue of speedy trial considerations.

In contrast, in other cases, such as petitioner's, it appears the KCOA is simply being indifferent to the instruction of K.S.A. 60-1507(b), rather than showing the abundance of deference accorded to careful review. While it is true that a great number of similar cases can be found, it stands to reason that such legal indifference has been allowed to flourish due to the misapprehension of AEDPA's comity logic by the federal district court.

C. The Court's Reliance on *Miller* is Misplaced

The Court's clarification (Doc. 28) raised *Miller* for the first time and this is the first opportunity the petitioner has had to respond.

The Court's clarification states (Doc. 28, p. 3, lines 14-19):

> For example, in *Miller v. State*, 2012 WL 5373373, at *2 (Kan. Ct. App. 2012), rev. denied Sept. 4, 2013, Brandon Miller filed a 60-1507 motion in the district court in which he made multiple arguments. The district court summarily denied the motion. Id. On appeal, however, Miller *chose* not to raise all the issues he had raised in the district court. Id. at *2-3. [Emphasis added.]

Here the operative word is "chose." Miller chose not to raise all the issues he had raised in the district court.

However, petitioner's case is the *opposite*: Petitioner chose to raise both the legal indifference and public trial issues on appeal before the KCOA. See *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, pp. 8-9 ("Pattern of Deliberate Indifference") and p. 9 ("New Matter").

The Court's clarification cites the following passage from *Miller* (Doc. 28, p. 3, lines 20-31):

> "We focus on the specific claim being made by Miller. . . . To the extent that any broader claim was made in Miller's original motion, it has been waived by the filing of his appellate brief. See *Edgar*[*v. State*, 294 Kan. 828, 844, 283 P.3d 152 (2012)] (noting that the defendant 'makes only a very limited argument' on appeal of the denial of his K.S.A. 60-1507 motion and addressing only the limited argument raised); *State v. Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007) (noting that failure to brief on appeal a topic mentioned in earlier motion before trial court to suppress evidence waived the issue on appeal)." *Miller*, 2012 WL 5373373, at *3.

First, it should be noted that *Miller's* reference to *Walker* follows the same chain of citations as *Herrell*, which find their starting point at *Words*, as previously discussed.

Second, as to *Miller's* reference to *Edgar*, applying *Edgar* to petitioner only **strengthens** his case, much like *Louis*, which is contrary to what the Court suggests.

In *Edgar*, the KSC states (294 Kan. at 836-837):

> When a district judge summarily denies a K.S.A. 60-1507 motion, an appellate court reviews that decision using a de novo standard of review. *Holt v. State*, 290 Kan. 491, 495, 232 P.3d 848 (2010) (citing *State v. Howard*, 287 Kan. 686, 690-91, 198 P.3d 146 [2008]). This standard requires an appellate court to determine whether the motion, files, and records of the case conclusively show the movant is not entitled to any relief. *Wimbley v. State*, 292 Kan. 796, 804-05, 275 P.3d 35 (2011).

Accordingly, the KSC in *Edgar*, on review of a 60-1507 appeal, scolded the KCOA for its failure to do so (id. at 844):

> Had the Court of Appeals conducted that review, it would have undertaken a de novo review to determine if the motion, files, and records of the case conclusively showed that Edgar failed to establish a reasonable probability that, but for defense counsel's errors, the outcome of his trial would have been different. This court applies the same standard of review.

While it is fair to say the KSC did not volunteer to turn over every stone in the record, it did address every issue which the appellant Neil Edgar, Sr., *chose* to present on appeal. The KSC addressed Edgar's claim even though "in posing the issue he makes only a very limited argument…." Id. at 844. Nor did the inquiry stop at Edgar's limited argument. On the contrary, true to the instruction of K.S.A. 60-1507(b), the KSC reviewed the *record* as well, finding that, "In addition, a review of the record provides additional reasons to conclude the district judge did not err in ruling that Edgar failed to meet his burden." Id. at 845.

D. The Court's Clarification Contradicts *Edgar*

In an appeal from the summary denial of a 60-1507 motion, even when "in posing the issue he makes only a very limited argument," 294 Kan. at 844, *Edgar* requires the KCOA to review de novo every issue a petitioner chooses to raise, both in view of the argument itself as well as in view of the record as a whole. Hence, because the present petitioner *chose* to pose the legal indifference issue on appeal, the Court's clarification (Doc. 28) is faulted for enforcing a procedural default despite contradiction with *Edgar*.

On collateral-review appeal, petitioner raised the legal indifference issue as follows (see *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, pp. 8-9 ("Pattern of Deliberate Indifference")):

> Pattern of Deliberate Indifference
>
> Roeder was employed as a humble airport delivery worker. He rose to the occasion and put his entire life on hold to save babies from a despicable execution at the hands of terror.
>
> In return, he was not given a fair trial, only because it would have vindicated what he did. Instead, as detailed in the Movant's Brief in Support of the Motion Attacking

> Sentence, he has been subjected to an arms-length pattern of deliberate legal indifference. Of these, the denial of the twin rights is but one example.
>
> The Court is therefore asked to exercise its supervisory power over the issue.

Petitioner had already detailed the twin rights issue in his pro se appellate brief and so there was no need to repeat it again when referencing it as part of his argument in support of the legal indifference issue. See *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, pp. 7-8 ("Twin Rights"). The validity of the twin rights part of petitioner's legal indifference argument is evident in that the KCOA addressed the merits of the twin rights argument at length. See *Roeder v. State,* No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, pp. 5-10 ("First appearance").

Hence, even if the KCOA viewed petitioner's argument supporting the legal indifference issue to be "very limited" in likeness to *Edgar*, id. at 844, it was still obligated in view of *Edgar* to address the issue, including based on the record. Moreover, petitioner makes an unambiguous reference to the record when he states in his pro se appellate brief, "[A]s detailed in the Movant's Brief in Support of the Motion Attacking Sentence, he has been subjected to an arms-length pattern of deliberate legal indifference." *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, p. 9, lines 2-3. Indeed, it is at best pedantic to require a collateral-review appellant acting pro se to duplicate what has already been clearly stated in a prior brief contained in the record. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Movant's Brief in Support of Motion Attacking Sentence, pp. 2-8 ("Claim 1: Roeder has been the victim of a pattern of legal indifference.")

Petitioner has been subject to a long and gratuitous pattern of legal indifference which has prejudiced from the get-go his constitutional right to fundamentally proceedings under the Due Process Clause of the Fourteenth Amendment. Adding to that pattern, the KCOA showed

legal indifference by falsely proclaiming a procedural default on the legal indifference issue. See *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 4, line 18—p. 5, line 2. Also adding to that pattern, the KCOA showed legal indifference by falsely stating that "Roeder does not allege, nor is there record evidence to establish, that Roeder was prejudiced in any way" at his first court appearance. Id. at p. 9, lines 20-22. See pp. 17-18, supra.

E. Default Requires an Adequate Bar to Proceedings

In order to qualify as an adequate bar to proceedings, a state procedural ground must be a "firmly established and regularly followed state practice" and applied to all similar claims in an evenhanded manner in the majority of cases. *Messer v. Roberts*, 74 F.3d 1009, 1015 (10th Cir. 1996) (citations omitted). By "similar claims" is meant in collateral review cases, as opposed to in other court proceedings. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues [on collateral review] by invoking procedural rules that they do not apply evenhandedly to all similar claims.")

In view of the contrary practices dictated by *Louis*, *Edgar*, and the plain language of K.S.A. 60-1507(b), the Court must conclude that the KCOA has not raised an adequate bar to proceedings concerning issues which petitioner *chose to raise* on appeal and which *find support* in the record.

Because the KCOA has not raised an adequate bar to proceedings, this Court is without authority to enforce a procedural default. See *Hathorn*, id. at 262-263.

F. Conclusion

The Court dismissed the legal indifference claim on a procedural ground without reaching the merits. Accordingly, petitioner has shown in view of the foregoing that fairminded jurists will unanimously agree that the petition states a valid claim of the denial of a

constitutional right and that fairminded jurists will unanimously agree that the Court was incorrect in its procedural ruling. However, if the Court disagrees, then it should at least find that jurists of reason would find such matters to be debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Comments on Respondent's Arguments (Cont'd)

With the foregoing comments on procedural default in mind, here petitioner resumes his comments on the arguments contained in respondent's answer (Doc. 27).

C. Closed Jury Selection

Petitioner chose to raise on collateral-review appeal an issue of the right to public proceedings during jury selection (see *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, p. 9 ("New Matter")):

> New Matter
>
> Because Roeder's Motion Attacking Sentence was dismissed at the pleading stages, he raises for the first time on appeal new matter consistent with the original pleading which was not presented to the district court but which could have been added by amendment. Namely, he believes trial counsel was ineffective who agreed with the district court that the public should not be present during parts of the jury selection. Noted is that Roeder raised this issue in writing to his court-appointed attorney in the present appeal, but she did not raise it in his attorney-filed brief.
>
> The Court is therefore asked to consider de novo whether the district court's bar on public proceedings was reversible error.

Finding the claim improperly raised for the first time on appeal, the KCOA declined to consider the merits of this claim, citing *State v. Kelly*, 298 Kan. 965 (2014) (see *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 4, line 22–p. 5, line 2):

> Roeder also raises a new issue for the first time on appeal. As a general rule, issues not raised before the trial court cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Roeder does not argue any of the recognized exceptions to this rule. Therefore, we will not address the new issue.

Encouragement to proceed further on the claim is provided by the presumption of prejudice which is shown on the basis that "public scrutiny would pressure [jury] candidates to answer honestly on abortion." See Petition under Section 2254 (Doc. 1), p. 8, ("Ground Three") ("Trial counsel was ineffective who agreed that the public need not be present during parts of jury selection (even though public scrutiny would pressure candidates to answer honestly on abortion).") However, because respondent has invoked a procedural default, the question turns to whether the Court should enforce it.

1.

First, the Court is alerted that respondent's effort to persuade the Court includes overtly inequitable conduct in the form of outright lying. Specifically, respondent falsely states in his answer (Doc. 27, p. 25, lines 18-19) that "Petitioner does not contend that he is actually innocent."

That respondent's statement is plainly false is evidenced by the fact that petitioner specifically asked the KCOA for a certificate of innocence, stating (see *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, pp. 9-10 ("Certificate of Innocence")):

> Certificate of Innocence
>
> Testimony from the coroner would require a new trial or an evidentiary hearing. But even without testimony from the coroner, if this Court finds in favor of equality with the unborn under Kansas law, then it would likewise be established that performing an abortion is a legal harm or evil. Combined with a finding that no reasonable juror would consider Roeder's belief in imminence to be unreasonable in view of the Barron's Memo, Roeder must be found legally and factually innocent of first-degree murder.
>
> This Court should therefore issue Roeder a certificate of innocence.

Even if one disagrees with the validity of petitioner's contention, it cannot be disputed that petitioner does in fact contend that he is actually innocent, that is to say, legally and factually innocent. It is likewise unmistakable that petitioner maintains in the present

proceedings his contention that he is actually innocent. See Petition under Section 2254 (Doc. 1), p. 15 ("Therefore, petitioner asks that the Court grant the following relief: … issue certificate of innocence … or any other relief to which petitioner may be entitled.")

The Court is alerted that respondent made his false statement specifically in a effort to deprive petitioner of invoking a miscarriage of justice to excuse procedural default under the standard of *Bousley v. United States*, 523 U.S. 614, 623 (1998). See Respondent's Answer (Doc. 27), p. 25, lines 15-19 ("A miscarriage of justice is shown when the error complained of probably resulted in the conviction of an innocent person. *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). However, Petitioner does not contend that he is actually innocent.")

Even if one disagrees that petitioner is entitled to invoke a miscarriage of justice on the basis of actual innocence, this does not change the fact that respondent chose to lie to the Court. Similarly, as was shown above, both the KCOA in its opinion and respondent in his answer have made the false claim that petitioner did not allege he was prejudiced in any way or deprived of a constitutional right by the denial of the twin rights. See pp. 17-18, supra.

This pattern of inequitable conduct suggests that the KCOA and respondent believe the federal courts are too lazy to research matters on their own and will instead simply take the state's word for everything. Accordingly, the Court should be wary of simply taking the word of the KCOA or respondent.

2.

Second, attention turns to whether the state has invoked an "adequate" bar to proceedings such as the Court may enforce.

In order to qualify as an adequate bar to proceedings, a state procedural ground must be a "firmly established and regularly followed state practice" and applied to all similar claims in an evenhanded manner in the majority of cases. *Messer*, id. at 1015 (citations omitted). By "similar claims" is meant in collateral review cases, as opposed to in other court proceedings. *Hathorn*, id. at 263 ("State courts may not avoid deciding federal issues [on collateral review] by invoking procedural rules that they do not apply evenhandedly to all similar claims.")

The reliance of the KCOA on *Kelly* fails the adequacy test required by *Messer* simply because *Kelly* was not a 60-1507 appeal and therefore did not deal with "similar claims" as required by the adequacy test. Indeed, it is most conspicuous that the KCOA failed to cite any authority involving a 60-1507 appeal to support its position.

Moreover, in view of the contrary practices dictated by *Louis*, *Edgar*, and the plain language of K.S.A. 60-1507(b), the Court must conclude at any rate that the KCOA has not raised an adequate bar to proceedings concerning issues which petitioner *chose to raise* on appeal and which *find support* in the record.

Because the KCOA has not raised an adequate bar to proceedings, this Court is without authority to enforce a procedural default. See *Hathorn*, id. at 262-263.

3.

Finally, attention turns to whether the KCOA was correct in its assertion that the closed jury selection issue was not "before the trial court." See *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, p. 4, line 22–p. 5, line 2

Consider a hypothetical claim, e.g., that the Sheriff had bragged at the jailhouse that he had captured a "guilty" woman, but without any support in the record. If the woman raises the

issue for the first time on a 60-1507 appeal, then it would be correct to say that the issue was not before the trial court, because it was not in the record.

On the other hand, by virtue of K.S.A. 60-1507(b), all matters contained in "the motion and the files and records of the case" are properly *before the trial court*. See also Kansas Supreme Court Rule 183(f) (2021 Kan. Ct. R. Annot. 240). Moreover, when the Kansas legislature directs the state district court under K.S.A. 60-1507(b) to conclusively show that the petitioner is entitled to "no relief," the legislature has thereby added to the 60-1507 motion *an omnibus claim* encompassing any and every possible ground for relief to which the petitioner may be entitled.

Hence, because petitioner's closed jury selection claim is supported by the files and records of the case and is fairly included within the scope of the omnibus claim which is before the trial court in all 60-1507 motions per legislative directive, the KCOA is incorrect in stating that the issue was not raised before the trial court.

Accordingly, in view of the deference for the record dictated by *Louis*, *Edgar*, and the plain language of K.S.A. 60-1507(b), in conducting de novo review the KCOA should have considered all issues which were supported by the record, including each one which petitioner chose to raise on appeal.

Consequently, the KCOA has not raised an adequate procedural bar to petitioner's closed jury selection claim, which leaves this Court without authority to enforce a procedural default. See *Hathorn*, id. at 262-263.

4.

To sum up, the motion, files, and records of the case conclusively establish petitioner is entitled to relief on his claim that he was denied the right to public proceedings on account of

closed jury selection, and which denial smacks of prejudice because public scrutiny would have pressured jury candidates to answer honestly on abortion, and there is no possibility that fairminded jurists could disagree that the state court decision conflicts with the Supreme Court's precedents and/or that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

D. Stay of Execution

Petitioner as a next friend with individual interests seeks a stay of lethal execution on behalf of unborn and partially born individuals under sentence of death, and has separately filed emergency motions to that effect in both the state district court and in this Court. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Emergency Motion for a Stay of Execution of Sentence of Death and Movant's Brief in Support of Emergency Motion for a Stay of Execution of Sentence of Death. See also Emergency Motion for Stay of Execution (Doc. 8); motion denied (Doc. 10); reconsideration denied (Doc. 21); second motion for reconsideration denied (Doc. 23); clarification granted (but not as to stay) (Doc. 28).

Respondent has essentially presented two issues: whether the requested stay is cognizable in Kansas as a 60-1507 proceeding; and, whether the requested stay is cognizable in federal court as a Section 2254 proceeding. See Respondent's Answer (Doc. 27), pp. 26-27 ("Petitioner's claim that he has standing to advocate for the rights of unborn children and seek a stay of their 'execution' is procedurally defaulted, and on its merits, is not a claim cognizable on federal habeas review.")

1.

K.S.A. 21-5419(a)(2) provides: "'unborn child' means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth."

K.S.A. 21-5419(c) provides: "As used in K.S.A. 2020 Supp. 21-5401, 21-5402, 21-5403, 21-5404, 21-5405, 21-5406 and subsections (a) and (b) of 21-5413, and amendments thereto, 'person' and 'human being' also mean an unborn child."

On the subject of "Jurisdiction and right to writ; time limitations," K.S.A. 60-1501(a) provides in part:

> Subject to the provisions of K.S.A. 60-1507, and amendments thereto, any person in this state who is detained, confined or restrained of liberty on any pretense whatsoever, and any parent, guardian, or next friend for the protection of infants or allegedly incapacitated or incompetent persons, physically present in this state may prosecute a writ of habeas corpus in the supreme court, court of appeals or the district court of the county in which such restraint is taking place.

The foregoing makes clear that a next friend may prosecute habeas corpus in Kansas on behalf of an infant, including one who is unborn or partially born.

Sometimes the words "standing" and "jurisdiction" get confused. However, it is evident from context that by standing both the state district court and the KCOA mean not that petitioner lacked standing per se to prosecute the stay as next friend of unborn and partially born individuals, but rather that the trial court lacked jurisdiction to grant the requested stay as an ancillary proceeding to petitioner's own 60-1507 proceeding. This is evident from the state district court's opinion that "[i]f Petitioner seeks to advocate on behalf of the partially born or unborn individuals within this Court's venue and jurisdiction, Petitioner should pursue that remedy in a separate action." See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Order filed 28 Nov 2017, p. 1, third paragraph ff. In other words, the district court would not have suggested petitioner initiate a separate action if his standing per se were in question. As to requiring a separate action, the district court reasoned that "[t]he request [for relief made in a 60-1507 motion] is unique to that individual and any requested relief afforded by the circumstances

of that individual's detention." Ibid. See also *Roeder v. State*, No. 119,503 (Kan. Ct. App. 2019), Opinion of the Court, pp. 17-18 ("Emergency Motion").

The state courts' decisions are contradicted by the plain reading of K.S.A. 60-1501(a), which provides that "[s]ubject to the provisions of K.S.A. 60-1507 … [a] next friend for the protection of infants or allegedly incapacitated or incompetent persons … may prosecute a writ of habeas corpus…." In other words, there is absolutely nothing in the plain reading of K.S.A. 60-1501(a) to suggest that a 60-1507 motion cannot be prosecuted by a next friend for the protection of infants or allegedly incapacitated or incompetent persons. On the contrary, the statute plainly states the complete opposite, namely, that "[s]ubject to the provisions of K.S.A. 60-1507 … [a] next friend for the protection of infants or allegedly incapacitated or incompetent persons … *may* prosecute a writ of habeas corpus…." Emphasis added.

Yet even assuming for the sake of argument that the state district court was correct in its appreciation of procedural formality, either way it took the wrong course of action. For example, in *State v. Randall*, 257 Kan. 482 (1995), the KSC found that mislabeled pro se motions for relief should be converted to permissible ones, and that when such motions are indeed permissible in another form, they should not be dismissed by the district court for lack of jurisdiction; instead, the district court should perform the conversion sua sponte.

Hence, because the state district court explicitly recognized that the motion for stay would be procedurally permissible as a "separate action" over which it would have "venue and jurisdiction," then in order to comport with *Randall* the motion for stay should have been converted by the district court into a permissible action. Accordingly, the district court would have been required either way to appoint counsel for the unborn and partially born and to grant the requested stay.

In order to qualify as an adequate bar to proceedings, a state procedural ground must be a "firmly established and regularly followed state practice" and applied to all similar claims in an evenhanded manner in the majority of cases. *Messer*, id. at 1015 (citations omitted). By "similar claims" is meant in collateral review cases, as opposed to in other court proceedings. *Hathorn*, id. at 263 ("State courts may not avoid deciding federal issues [on collateral review] by invoking procedural rules that they do not apply evenhandedly to all similar claims.")

In this case, the procedural ground suggested by the state cannot be firmly established because it is neither supported by a published ruling nor by the plain reading of K.S.A. 60-1501(a) and, importantly, it contradicts the instruction in *Randall*.

Because the KCOA has not raised an adequate bar to proceedings, this Court is without authority to enforce a procedural default. See *Hathorn*, id. at 262-263.

2.

Turning attention to this Court, the Court denied a motion for stay of execution (Doc. 8) filed by petitioner directly within this action under Section 2254 on the ground that "[h]is motion presents a challenge to matters outside the scope of this action [under Section 2254] and must be denied." See Order (Doc. 10, p. 2, lines 11-13).

In denying reconsideration, the Court states (Doc. 21, p. 3, lines 11-18):

> Finally, petitioner asks the court to reconsider his emergency motion for stay of execution, arguing that because his request is meritorious, he may bring it within this habeas corpus action. The cases petitioner provide to support his contention are inapplicable; they concern individuals under sentence of death as a result of criminal proceedings and the "unborn and partially born individuals" implicated in petitioner's emergency motion for stay of execution are not facing a criminal death sentence.

The Court's position is that an individual in jeopardy of court-sanctioned lethal execution can be denied the protections of habeas corpus accorded to a capital case simply because the court proceeding which sanctioned the execution was not formally styled as a criminal

proceeding. Yet as Shakespeare would say, "A rose by any other name…." In other words, the Court would abridge the full spectrum of habeas corpus protections normally accorded to the condemned simply by terming their condemnation "civil" instead of "criminal."

The motion for stay (Doc. 8) was denied on a procedural ground without reaching the merits, and it is important to appreciate why jurists of reason could disagree with the Court's decision. Also, because a similar consideration is currently before the Court as Ground Four for relief, it is important to appreciate reasons why the Court should not repeat the same course of action. See Petition under Section 2254, pp. 10-11 ("Ground Four") ("Unborn and partially born individuals under sentence of death have the right to a stay of lethal execution and Roeder has dual standing as an individual and next friend to seek the stay on their behalf.")

Federal law permits a next friend to seek habeas corpus relief. See 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*." Emphasis added.) The Court does not challenge petitioner's standing per se or reach the merits of the motion for stay. Instead, the Court objects only on the basis of procedural formality, which parallels the sole objection of the state district court.

Assuming for the sake of argument that the Court's appreciation of procedural formality is correct, either way the Court has taken the wrong course of action. As the Supreme Court held in *McFarland v. Scott*, 512 U.S. 849, 849 (1994), "A capital defendant need not file a formal habeas corpus petition in order to invoke his right to counsel under § 848(q)(4)(B) and to establish a federal court's jurisdiction to enter a stay of execution." Hence, even if the Court was correct in finding that the unborn and partially born failed to file a *formal* federal habeas corpus petition by way of the present petitioner acting as next friend, nonetheless the Court should have

immediately appointed counsel for the unborn and partially born and entered a stay of execution on their behalf when presented with the motion for stay (Doc. 8).

Yet by splitting hairs as to whether the unborn and partially born individuals implicated in petitioner's emergency motion for stay of execution are facing a "criminal" death sentence, the Court posits that it is simply not required to follow such directives and may ignore them altogether. See Order denying reconsideration (Doc. 21), p. 3, lines 11-18. However, jurists of reason can disagree with the Court's procedural ruling that a capital case cannot exist outside of formal criminal proceedings.

For example, in *Holtzman v. Schlesinger*, 414 U.S. 1316, 1316 (1972), the case of bombing in Cambodia by Defense Department officials was "treated as a capital case" and an application for a stay of execution of sentence of death was granted because denial "would catapult American airmen and Cambodian peasants into a death zone." Even though no formal death warrant had issued, Justice Douglas, in granting the application for a stay of execution of sentence of death, emphasized that "this case in its stark realities involves the grim consequences of a capital case" because even though "[n]o one knows who they are … [t]he upshot is that we know that someone is about to die." Id., at 1317. This proves a capital case can exist outside of criminal proceedings.

Following the reasoning of Justice Douglas, because the upshot is that we know someone is about to die, the lethal execution of unborn and partially born individuals is properly treated as a capital case, even when we do not know who they are and even in absence of a formal death warrant. Hence, this Court's position—namely, that a capital case cannot exist outside of formal criminal proceedings—is not only unsupported, it is plainly contradicted by a Member of the Supreme Court. Accordingly, jurists of reason can disagree with the Court's procedural ruling.

Because lethal executions of unborn and partially born individuals are scheduled to take place daily in Kansas and throughout the United States, the stay must be granted without delay to preserve their lives. See *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. That is, if the district court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying a stay.") Indeed, because *Lonchar* was a unanimous opinion of the Supreme Court, fairminded jurists will unanimously agree that the Court erred by denying the stay without reaching the merits.

As the Supreme Court explains the purpose of the writ of habeas corpus in *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969):

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U. S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

As to the "arbritary and lawless state action" spoken of in *Harris*, id. at 290-291, the emergency motion states (see Doc. 8, p. 1 ("Jurisdiction")):

> This Court's jurisdiction to grant the requested stay pursuant to 28 U.S.C. § 1651(a) is invoked due to "extraordinary circumstances": (1) the death penalty is being freakishly and arbitrarily applied in the United States and Kansas to execute unborn and partially born individuals in violation of the Eighth Amendment; (2) the unborn and partially born have been summarily condemned to death in absence of counsel for their defense in violation of the Fifth, Sixth, and Fourteenth Amendments; and (3) Fed. R. Crim. P. 38(a) and Kan. S. Ct. Rule 10.02 have not been followed on behalf of unborn and partially born individuals under sentence of death because they have been denied their right to appeal their sentence of death.

But rather than following *Harris'* instruction to administer the writ of habeas corpus "with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected," instead by denying the writ altogether this Court and the state courts have chosen to add to the "barriers of form and procedural mazes" which prevent such correction. *Harris*, id. at 291. As a consequence, children like "Sam" are being lethally executed by Dr. Tiller's counterparts despite the appearances made on their behalf by petitioner as their next friend before this Court and the state courts seeking a stay of lethal execution.

Fairminded jurists will unanimously agree that it is wrong to hide behind euphemisms and a multilayered façade of procedural defaults to avoid granting habeas corpus to spare babies from being lethally executed, regardless of whether the babies are being scalped, aborted, or in some cases both.

3.

It should be remembered that petitioner has individual interests in the granting of the stay in addition to those of a next friend, mainly because by vindicating the right of the unborn and partially born to a stay of lethal execution, petitioner will at the same time be vindicating his own actions to save them from lethal execution.

Accordingly, fairminded jurists will agree that petitioner's effort to vindicate his killing of Dr. Tiller was prejudiced by denial of the stay.

It should also be remembered that, rather than promising that abortion, once legalized, would be incapable of interruption in the ordinary course of judicial affairs, the Supreme Court forewarned in *Roe v. Wade*, 410 U.S. 113, 156-157 (1973), that if the "suggestion of personhood is established ... the fetus' right to life would *then* be guaranteed specifically by the [Fourteenth] Amendment." Emphasis added. By would "then" be guaranteed means at the very moment the

suggestion is established. It follows that legal authority to stay the execution of those sentenced to death by abortion is preserved pending establishment of the suggestion of personhood.

Rather than deferring to religious or philosophical debates on the existence of a spiritual personhood, and which debates go beyond the scope of the separation of church and state embodied in the Free Exercise and Establishment clauses of the First Amendment, in the emergency motions for stay presented to this Court and the state courts petitioner has instead established a purely secular suggestion of natural personhood at conception. See *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Emergency Motion for a Stay of Execution of Sentence of Death, pp. 11-15 ("Establishment of the Suggestion of Personhood"). See also Emergency Motion for Stay of Execution (Doc. 8), pp. 2-3 ("Establishment of the Suggestion of Personhood").

Nor was petitioner's choice to establish the suggestion of personhood within an emergency motion for stay of execution an arbitrary one (see *Roeder v. State*, No. 17-CV-2373 (Sedg. Co. Dist. Ct.), Emergency Motion for a Stay of Execution of Sentence of Death, p. 7, lines 13-21):

> The long awaited "proof" of personhood, however, is not merely academic in its consequence, but rather it has real consequences, both for Roeder individually and for unborn and partially born individuals under sentence of death. Thus, assuming, *arguendo*, that Roeder is in fact capable of establishing the suggestion of personhood on behalf of unborn and partially born individuals, then the proper instrument for doing so is a motion for stay of execution, since death is irrevocable. Otherwise lives would be lost in the meantime if the suggestion of personhood was to be established by means of a legal instrument of less urgency, such as a memorandum.

Indeed, petitioner says as much in his motion before this Court (see Emergency Motion for Stay of Execution (Doc. 8), p. 4 ("Choice of Instrument")):

> Because establishment of the suggestion of personhood carries with it the legal weight of the right to life and which right must be preserved with all manner of expedience, a

motion for a stay of execution, as opposed to a memorandum or other paper, is the best choice of legal instrument in which to establish the suggestion of personhood.

Accordingly, fairminded jurists will unanimously agree that judicial acceptance of the establishment of the suggestion of personhood presented by petitioner in his emergency motions for a stay of execution will not only benefit his interests individually within the scope of the 60-1507 and Section 2254 proceedings, but it will also benefit the unborn and partially born whose interests he relates as next friend.

4.

To sum up, the motion, files, and records of the case conclusively establish petitioner is entitled to relief on his claim that he was denied the stay of execution requested in his emergency motion both individually and as next friend, and there is no possibility that fairminded jurists could disagree that the state court decision conflicts with the Supreme Court's precedents and/or that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Comments on Cause and Prejudice

Though petitioner has shown prejudice, the Court has previously denied petitioner's showing of cause to excuse a procedural default (Docs. 10, 21, and 23).

The Court in its second order denying reconsideration states (Doc. 23, p. 3, lines 11-22):

> Next, petitioner contends that the court was incorrect when it asserted that he had not presented to the state courts his claim that collateral-review counsel provided ineffective assistance. (Doc. 22, p. 2.) Petitioner asserts that he raised this issue in a motion for rehearing filed with the KCOA and he suggests that an evidentiary hearing is needed to prove he raised the claim both in his motion for rehearing and his pro se supplemental reply brief. *Id.* Unfortunately, like a reply brief, "a motion to reconsider is not a place to raise new issues or obtain a second chance to present a stronger case." *State v. Briggs*, 2018 WL 3995795, at *4 (Kan. Ct. App. 2018) (Arnold-Burger, C.J., concurring), *rev. denied*, Dec. 6. 2019).

However, it is an ethical principle, and one the Supreme Court has upheld, that counsel cannot withdraw from fully briefing an appeal without leave from the appellate court. See *Anders v. California*, 386 U.S. 738, 744 (1967) (requiring an attorney, attempting to withdraw because an appeal is frivolous, to seek permission to withdraw from the court and to file a brief directing the court to anything in the record that might support the appeal). See also Kansas Supreme Court Rule 1.09(e) (2021 Kan. Ct. R. Annot. 9) (requiring notice and leave before withdrawing).

In his motion for rehearing and his pro se supplemental reply brief, petitioner claimed that collateral-review counsel was incapable who withdrew on her own initiative from fully briefing the appeal without leave from the KCOA. As stated in petitioner's motion for rehearing (see *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Rule 7.05 Motion for Rehearing of Appellant Scott P. Roeder, p. 11, lines 17-22):

> The emergency motion was not briefed by counsel because appointed counsel dismissed herself from her obligation to pursue on appeal the emergency motion denied by the district court, without first obtaining leave from this Court. The fact that the Court addressed the emergency motion in its judgment (Appendix A, pp. 17-18) proves it should have been pursued and briefed by capable counsel.

See also id., Pro Se Supplemental Brief of Appellant Scott P. Roeder, p. 4, line 12—p. 5, line 2.

In her brief, and without prior notice to petitioner, collateral-review counsel dismissed herself without leave from fully briefing the appeal, as follows (see *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Brief of Appellant Scott P. Roeder, p. 4, lines 3-10):

> Counsel believes that pursuit of Roeder's motion on behalf of unnamed third persons is outside the scope of her appointment to represent him under the Indigent Defense Services Act, K.S.A. 22-4501 et seq., which provides for the appointment of counsel to represent indigent persons accused of crimes, indigent persons convicted of crimes on direct appeal, and indigent persons in custody under a sentence of imprisonment upon conviction of a felony on a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507 and any related appeals. Counsel has so advised Roeder in a letter sent with this Brief.

In other words, counsel did not follow the notice and leave requirements of Kansas Supreme Court Rule 1.09(d), but instead did the exact opposite of what the Supreme Court required in *Anders*, id. at 739 ("Counsel's bare no-merit conclusion was not an adequate substitute for petitioner's right to *full* appellate review. [Emphasis added.] To satisfy the requirement of substantial equality and fair process, counsel must be an active advocate, not just an *amicus curiae*.") And while it is true that *Anders* was a case on direct appeal in contrast to petitioner's collateral-review appeal, the ethics are unchanged.

Hence, given the unique circumstances of counsel's underperformance, petitioner was entitled to raise the issue of ineffective assistance as an independent claim at the KCOA *as an ethics violation*. That the KCOA chose not to respond to it shows that the KCOA was indifferent to counsel's conspicuous ethics violation.

Accordingly, even if any of petitioner's claims presented to this Court are held to be procedurally defaulted, petitioner is able to show cause and prejudice because he presented to the KCOA a claim of collateral-review ineffective assistance based on an ethics violation which deserved attention. Indeed, no state procedural rule would have barred the KCOA from addressing collateral-review counsel's ineffectiveness as an ethics violation. The refusal of the KCOA to address counsel's ethics violation was nothing short of indifference, adding to a long history of indifference for petitioner's right to fundamentally fair proceedings.

In other words, the question is whether petitioner was procedurally entitled to raise the issue of collateral-review counsel's ineffectiveness at the KCOA. The answer is that, due to counsel's ethics violation, indeed he was. And he did.

That the issue was not addressed goes only to the KCOA's indifference.

Comments on Miscarriage of Justice

Petitioner can demonstrate that this Court's failure to consider all of his claims will result in a fundamental miscarriage of justice. See *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986). Had petitioner been permitted to present his case in a trial free from nonharmless constitutional error, it is more likely than not true that no reasonable juror would have convicted him, whether of premeditated first-degree murder for preventing the homicide of at least one baby scheduled for execution or of either of two aggravated assaults, the petitioner having acted lawfully to defend an innocent third party from death, whereby at every step he acted to minimize collateral damage and always retained the right to maintain control of his person.

Accordingly, petitioner's assertion of legal and factual innocence has merit because, taking into account all of the evidence, it is more likely than not true that no reasonable juror would have convicted him. The assertion may therefore be applied to excuse procedural default and to earn him a certificate of innocence. See *Bousley v. United States*, 523 U.S. at 623 (A miscarriage of justice is shown when the error complained of probably resulted in the conviction of an innocent person.) See also *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("[I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.")

In contemplating a miscarriage of justice, the Court should give weight to respondent's decision to lie about whether petitioner claimed actual innocence, especially because it is evident that respondent did so with the intention of dissuading the Court from allowing petitioner's claims to pass through the gateway based on a miscarriage of justice. See Respondent's Answer

(Doc. 27), p. 25, lines 15-19 ("A miscarriage of justice is shown when the error complained of probably resulted in the conviction of an innocent person. *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). However, Petitioner does not contend that he is actually innocent.")

As stated above, pp. 42-43, #1, respondent's falsehood is plainly evidenced by the fact that petitioner specifically asked the KCOA for a certificate of innocence. See *Roeder v. State,* No. 119,503 (Kan. Ct. App.), Pro Se Supplemental Brief of Appellant Scott P. Roeder, pp. 9-10 ("Certificate of Innocence"). Moreover, it is likewise unmistakable that petitioner maintains in the present proceedings his contention that he is actually innocent. See Petition under Section 2254 (Doc. 1), p. 15 ("Therefore, petitioner asks that the Court grant the following relief: ... issue certificate of innocence ... or any other relief to which petitioner may be entitled.")

Conclusion

The suggestion of personhood having been established, the Court should appoint counsel and issue an appropriate order to save from homicidal abortion all unborn and partially born individuals subject to lethal execution throughout the United States and Kansas.

The petition for habeas corpus should be granted.

Respectfully submitted,

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Pro Se and as Next Friend

Dated: 7-30-21, 2021

"Sam"